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Affin Bank Bhd v Concord Dynamics Sdn Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-835 OF 2003

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SYED AHMAD HELMY JC
16 JUNE 2004

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Land Law — Charge — Order for sale — Whether the unconscionable conduct of plaintiff was highly inequitable — Whether existed 'cause to the contrary' — National Land Code 1965 s 256(3)

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The plaintiff bank applied for an order for sale of the landed property of the defendant held under HS(D) 17034 PTD 9992 and charged as security for an overdraft. In opposing the plaintiff's application, the defendant filed two affidavits, encl 9 and 9A. The defendant argued that the letter dated 30 April 2002 provided that the plaintiff agreed to reinstate the overdraft facilities subject to the terms in the said letter which was accepted by the defendant and evidenced by the plaintiff's bank statement dated 30 June 2002. The defendant further argued that the letter dated 30 April 2002, exhibited in the defendant's affidavit and marked without prejudice was said to reflect the defendant's acceptance of RM15,000. Hence, there was admissible evidence. However, the defendant's attempt to effect a further payment of RM5000 was stifled by the plaintiff's action in demanding a full settlement. The issues to be determined by the court were: (1) since the defendant had acted upon the terms of the agreement, could the plaintiff unilaterally resile from the agreement and insist on full payment; and (2) whether the unconscionable conduct of the plaintiff amounted to 'cause to the contrary' under s 256(3) National Land Code ('NLC').

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Held, dismissing the plaintiff's application with costs:

(1) The plaintiff was in clear breach of the term of the agreement reached between the parties evidenced by the terms of the plaintiff's letter dated 30 April 2002 when the defendant had acted upon it. The plaintiff was bound by the agreement and could not unilaterally resile from the agreement and insist on full payment when there was no evidence of default by the defendant (see para 7 & 8).

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(2) The plaintiff's unconscionable conduct was highly inequitable and amounted to 'cause to the contrary' under s 256(3) NLC. It came within the principle in *Murugappa Chettiar v Letchumanan* [1939] MLJ 296. The provision of s 256(3) acknowledges the contravention of rule of law or equity which satisfies the existence of cause to the contrary. Hence, the defendant had shown cause to the contrary (see para 10).

[Bahasa Malaysia summary

Plaintif bank memohon untuk satu perintah jualan sebuah hartanah defendan yang dipegang dibawah HS(D) 17034 PTD 9992 dan yang dicagarkan sebagai jaminan untuk satu kemudahan overdraf. Membantah permohonan plaintif, defendan memfailkan dua afidavit; lamp 9 dan 9A. Defendan menghujahkan bahawa surat bertarikh 30 April 2002 menyatakan yang plaintif bersetuju untuk menghidupkan semula kemudahan overdraf tertakluk kepada terma-terma yang dinyatakan di dalam surat tersebut yang mana ianya telah diterima oleh defendan dan disokong oleh pernyataan plaintif bank bertarikh 30 Jun 2002. Defendan seterusnya menghujahkan bahawa surat bertarikh 30 April 2002 yang diexhibitkan di dalam afidavit defendan dan ditanda tanpa prejudis menunjukkan defendan telah menerima RM15,000. Olehyang demikian, ianya adalah satu keterangan boleh terima. Namun begitu, percubaan defendan untuk membuat bayaran selanjutnya sebanyak RM5000 telah disekat oleh tindakan plaintif yang menuntut bayaran penuh. Isu-isu yang perlu diputuskan oleh mahkamah adalah: (1) oleh kerana defendan telah bertindak seperti terma-terma perjanjian tersebut, adakah plaintif boleh secara satu pihak membelakangi perjanjian tersebut dan menuntut bayaran penuh; dan (2) sama ada perbuatan tidak berhemat plaintif adalah 'kausa bertentangan' dibawah s 256(3) Kanun Tanah Kebangsaan ('NLC').

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Plaintif secara jelas telah mengingkari terma-terma perjanjian yang telah dicapai diantara pihak-pihak sebagaimana yang dinyatakan di dalam surat plaintif bertarikh 30 April 2002 dan yang defendan telah bertindak keatas surat tersebut. Plaintif terikat dengan perjanjian tersebut dan tidak boleh secara sebelah pihak membelakangi perjanjian tersebut dan berkeras menuntut bayaran penuh apabila tiada keterangan mengenai pengingkaran pada pihak defendan.

(2) Perbuatan tidak berhemat plaintif sangatlah tidak berekuiti dan adalah satu 'kausa bertentangan' di bawah s 256(3) NLC. Ianya tertakluk kepada rukun di dalam kes *Murugappa Chettiar v Letchumanan* [1939] MLJ 296. Seksyen 256(3) mengiktirafkan perlanggaran kedaulatan undang-undang atau ekuiti dengan kewujudan kausa bertentangan. Oleh yang demikian, defendan telah menunjukkan kausa bertentangan.]

Notes

For cases on order for sale, see 8(1)*Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

Cases referred to

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd [1989] 1 MLJ 457 (refd)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17 (refd)
Murugappa Chettiar v Letchumanan Chettiar [1939] MLJ 238 (refd)

Legislation referred to
National Land CodeNational Land Code s 256(3)

Daniel Ansara b Mohd Top (Hamzah, Sulaiman & Partners) for the plaintif.
Tan Hee Soon (Tan Hee Soon & Co) for the defendant.

Syed Ahmad HelmyJC:

[1] Application by plaintiff bank for an order for sale of the landed property of the defendant held under HS[D]17034 PTD 9992 Mukim Plentong, Daerah Johor Bahru, Negeri Johor [hereinafter called the property] which was charged as security for overdraft and financing facilities granted by the plaintiff to the defendant.

[2] In opposing the plaintiff's application, the defendant had filed in two affidavits in encl 9 and 9A.

[3] It is the thrust of the defendant's case that there has been settlement of the accounts by reason of the plaintiff's letter dated 30 April 2002 addressed to the defendant and exhibited as LSH-3 in plaintiff's affidavit in encl 3 wherein the plaintiff agreed to reinstate the overdraft facilities subject to the terms therein, which terms was accepted by the defendant as evidenced by the plaintiff's bank statement dated 30 June 2002 exhibited as 'ML-1' in defendant's affidavit in encl 9. It is to be observed that there is record of the payment of the sum of RM15,000 in 'ML-1' which is in fulfillment of condition 1 of the plaintiff's letter of 30 April 2002.

[4] Though the letter of 30 April 2002 [exh LSH-3] is marked without prejudice nevertheless in my view by reason of the defendant's acceptance as evidenced by the payment of RM15,000 by the defendant as reflected in 'ML-1' there is a settlement and hence is admissible as evidence - see *Malayan Banking Berhad v Foo See Mai* [1981] 2 MLJ 17.

[5] Further the defendant averred in para 7(iv) of his affidavit in encl 9 that his attempt to effect the further term of monthly payment of RM5000 was stifled by the plaintiff by their unilateral action of demanding full settlement of the outstanding sum as per their letter of 2 July 2002 in exh 'ML-2' of encl 9 without furnishing any reason whatsoever.

[6] The sequence of events aforesaid to my mind reflects the highly unconscionable conduct of the plaintiff. In essence the letter of 2 July 02 [exh 'ML-2'] is clear evidence of the unconscionable conduct of the plaintiff which has severely prejudiced the defendant.

[7] It is my considered view that by issuing the letter of 2 July 2002, the plaintiff was in clear breach of the agreement reached between the parties upon the terms of the plaintiff's letter of 30 April 02 [exh LSH-3] more so when it had been acted upon by the defendant.

[8] Plaintiff is bound by the agreement upon the terms in exh LSH-3 and cannot now unilaterally resile from the agreement and insist on full payment when there is no evidence of default by the defendant.

[9] The plaintiff's unconscionable conduct is highly inequitable and amounts to 'cause to the contrary' within the meaning of s 256(3) of the National Land Code and falls squarely within the principle in *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 where Aitken J. stated:

> ……. a chargor may 'show cause' either in law or equity against an application for an order for sale, and that the Courts should refuse to make an order in *every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity* which are in force in the Federated Malay States.

[10] The mandatory provisions of s 256(3) National Land Code acknowledges that contravention of rule of law or equity satisfies the existence of 'cause to the contrary' (see *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457.

[11] It should be emphasized that the plaintiff's counsel herein did not offer any submissions against the contentions and submission of the defendant's counsel and left the matter to the court.

[12] By reason of the foregoing I accordingly hold that the defendant has shown 'cause to the contrary' and the plaintiff's application is accordingly dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Janani S